No. 14406

In the United States Court of Appeals for the Ninth Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

IDAHO LUMBER COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR APPELLANT

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Chief of Appellate Litigation,
MORTON J. MARKS,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

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In the United States Court of Appeals for the Ninth Circuit

No. 14406

James P. Mitchell, Secretary of Labor, United States Department of Labor, appellant

v.

Idaho Lumber Company, a Corporation, appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the District of Idaho, Eastern Division, dismissing an action brought by the Secretary of Labor under Section 16 (c) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060; as amended in 1949 by c. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.) 201 *et seq.*,[1] to recover unpaid overtime compensation due and owing to appellee's employees named in the complaint (R. 3). The final judgment was entered on March 30, 1954 (R. 20). Notice of appeal to this Court was filed on May 19, 1954 (R. 20).

[1] The pertinent statutory provisions are printed in full in the Appendix, *infra*. p. 16.

As set forth in the complaint (R. 4), the district court had jurisdiction under Section 16 (c) of the Act and 28 U. S. C. (1952 ed.) 1337. This Court has jurisdiction to determine the appeal under 28 U. S. C. (1952 ed.) 1291 and 1294 (1).

STATEMENT OF THE CASE

There appears to be no dispute regarding the essential facts. Appellee is engaged at Salmon, Idaho, in the operation of a sawmill and planing mill for the production, sale and distribution of green and finished lumber (Finding of Fact No. 2, R. 18). This action, which was initiated after the employees named in the complaint (Laverne F. Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn) filed written requests that the Secretary of Labor bring this action on their behalf (Finding of Fact No. 3, R. 18; Stipulation, R. 22), seeks to recover unpaid overtime compensation only for the periods of time in which the employees undisputedly were engaged in the production of some goods for out-of-State shipment (Finding of Fact No. 4, R. 18–19; R. 27–28).

The undisputed evidence reveals, and the district court found as a fact, that during the times covered by this action appellee had been engaged in the production of lumber and lumber products consisting of a quantity of bean boxes and pallets which were shipped to seed processing plants of the Rogers Brothers Seed Company located outside the State of Idaho (Finding of Fact No. 4, R. 18–19; R. 28). Appellee's president testified that he knew the pallets and bean boxes were to be delivered outside the State of Idaho

when he took the Rogers Brothers order in February 1952 (R. 39–40), and that the lumber used in the manufacture of the bean boxes and pallets was produced in the Salmon, Idaho, mill after the order had been taken (R. 50–51).

It is undisputed that Kramp, Pierce and Horn were employed in the production of lumber for the Rogers Brothers order for the workweek ending March 28, 1952 (approximately two months before the first out-of-State shipment), through the workweeks ending May 30, 1952 (approximately two months before the last out-of-State shipment), and that Westfall was employed in the manufacture of bean boxes and pallets for the workweek ending May 9, 1952 (approximately two weeks before the first out-of-State shipment), through the workweeks ending August 28, 1952 (approximately the date of the last out-of-State shipment) (R. 50–51, and plaintiff's Exhibit No. 4). It is further undisputed that the amounts claimed to be due and owing to the employees (as shown on Plaintiff's Exhibit No. 1) as overtime for hours worked in excess of 40 hours per week are correct for the workweeks during which the employees were engaged in the production of lumber or lumber products for out-of-State shipment to the Rogers Brothers Seed Company (Stipulation, R. 22–23).

Out-of-State shipments of pallets and bean boxes were made almost weekly for the period from May 21, 1952, until August 25, 1952. Appellee's gross sales for the months of May, June, July, and August 1952, totalled approximately $80,000 (Plaintiff's Exhibit

No. 7), of which $11,561.49 worth, or over 14%, was for pallets and bean boxes which were produced for shipment outside of the State of Idaho (Plaintiff's Exhibit No. 4; R. 28).

The district court, while finding that "lumber or productions" consisting of a quantity of pallets and bean boxes were shipped outside the State, concluded that since the goods were produced under a single contract, the contract constituted "an isolated transaction *outside of the ordinary and usual course of defendant's business and operations,* and, as such, did not constitute production of goods for interstate commerce within the meaning of the Fair Labor Standards Act." (Finding of Fact No. 4, R. 18–19.) [Emphasis supplied.]

SPECIFICATION OF ERRORS

1. The court below erred in findings of fact IV and V in concluding that employees engaged during specified workweeks in the production of goods for out-of-State shipment are not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act because such goods were produced under a single contract "outside the ordinary and usual course" of the employer's business.

2. The court below erred in failing to find as a fact that employees who, during the workweeks involved in this action, were substantially engaged in the production of goods intended for interstate shipment and actually so shipped, were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. The court below erred in failing to conclude as a matter of law, that appellee's employees were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The court below erred in dismissing the complaint and in failing to grant the judgment for back wages prayed for in the complaint.

ARGUMENT

Employees are entitled to the benefits of the Act for the particular workweeks in which they are engaged substantially in the production of goods for interstate shipment regardless of the fact that their employer does not ordinarily produce goods for interstate commerce

The undisputed facts here show that the three employees on behalf of whom this suit was instituted were employed, during the particular period of time covered by the complaint, in the production of lumber intended for out-of-State shipment, and actually so shipped, each week during the period in question. There can be no doubt therefore that during this period their work falls within the plain terms of the Fair Labor Standards Act.

As the Supreme Court has repeatedly emphasized, the Act applies to the interstate shipment of " '*any* goods' in the production of which '*any* employee' was employed" *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178, 184. [Emphasis supplied.] Congress "by the present Act adopted the policy of excluding from interstate commerce *all goods* produced for the commerce which do not conform to the specified labor standards" and "made no distinction as to the volume or amount of shipments in the commerce or of

production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great" (*United States* v. *Darby,* 312 U. S. 100 at 121, 123). [Emphasis supplied.] The decision of the court below simply ignores these plain statutory terms and policy. For obviously the total effect of short periods of production for interstate commerce by many producers like defendant here could be just as serious as the total effect of the competition of many small producers.

It is thus clear that neither the terms nor the policy of this Act provide any exemption for production of goods for interstate commerce by reason of the fact that the employer does not always or ordinarily produce for interstate shipment. On the contrary, it is now too well settled for argument that it is the *employee's* work, and *not the character of the employer's business,* that determines the applicability of the Act, for "to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged" within the meaning of this Act. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517 at 524. As the Supreme Court has pointed out "the provisions of the Act expressly make its application dependent upon the character of the *employees'* activities" even "where the employer is not himself engaged in an industry partaking of interstate commerce." [Emphasis supplied.] See *Kirschbaum Co.* v. *Walling,* 316 U. S.

517, at 524. "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities." *Overstreet* v. *North Shore Corp.,* 318 U. S. 125 at 132.

The Supreme Court's decisions also make it clear that the benefits of the Act are not to be denied on the grounds that the employer's business may be largely local and intrastate or that the employee also performs work in connection with the intrastate aspects of his employer's business. Thus in *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, although the "bulk of the merchandise" handled in the warehouses was for "local disposition" (317 U. S. at 566, 570, 571–572), the Supreme Court specifically ruled:

> The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra,* p. 524.

This Court explicitly recognized and applied these principles in *Tipton* v. *Bearl Sprott,* 175 F. 2d 432, 435, where it stated:

> * * * the applicability of § 7 (a) of the Act, 29 U. S. C. A. § 207 (a), is determined, not by the nature of the employer's business, but by the character of the employee's activities.

See also *Kam Koon Wan* v. *E. E. Black, Limited,* 188 F. 2d 558 at 562 (C. A. 9) certiorari denied, 342 U. S. 826.

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Thus the fact that the employer, during *other* periods of time, or ordinarily, may not produce goods for interstate commerce is plainly not a valid reason for denying the benefits of the Act to employees for workweeks in which they did engage substantially in the production of goods for commerce.

Directly in point here is the Fifth Circuit's decision in *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773 (C. A. 5), which presented almost precisely the same "isolated transaction" point advanced here. The trial court there had held that an employee engaged in the repair and reconversion of a single surplus yacht, prior to its sale and transportation outside the State, was not within the coverage of the Act. On appeal, despite defendant's reliance on the argument that a single isolated transaction outside the regular course of an employer's business is not within the Act (see appellee's brief in *Bodden,* pp. 14–15), the Fifth Circuit reversed, stating: [2]

> * * * Whether or not * * * the transportation of goods is "commerce" within the definition

[2] The Fifth Circuit's decision in the *Bodden* case is supported by numerous decisions of the Supreme Court in which isolated transactions, completely separate and apart from any business, involving the movement of goods or persons across State lines have been held to constitute "commerce." See *Caminetti* v. *United States*, 242 U. S. 470 (transportation of a woman for an immoral purpose, but not for commercial vice); *Gooch* v. *United States*, 297 U. S. 124 (transportation of a kidnapped person); *Brooks* v. *United States*, 267 U. S. 432 (transportation of a stolen automobile). And see *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 549, rehearing denied 323 U. S. 811, where the Supreme Court stated, "not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic. * * *."

> of the Act, does not depend upon whether such transportation is in connection with a trade or business.
>
> Moreover it is not the nature of the employer's business, but the character of the employee's work that determines the applicability of the Act. [188 F. 2d at 775.]

The court below was therefore plainly in error in relying upon the *employer's* "ordinary and usual course of * * * business and operations" to conclude that the *employees* here were not engaged in production for interstate commerce. This determination can be properly made only by reference to the employee's activities during the particular workweeks in question.

During the 15 years that the Fair Labor Standards Act has been in effect, the Act has been applied and enforced administratively on the basis that the employee's workweek is the standard for determining coverage and the amounts due underpaid employees.[3] Virtually all of the courts, including this Court, seem plainly to have adopted this workweek standard.[4] As stated in *Tobin* v. *Alstate Const. Co.,* 195 F. 2d 577, 580 (C. A. 3, 1952), affirmed 345 U. S. 13:

> * * * As long as any individual employee spends a substantial part of the work-week in

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[3] Interpretative Bulletin No. 5, Wage and Hour Division, United States Department of Labor, originally issued in December 1938, par. 9, 1940 Wage Hour Manual 131; reiterated in most recent Interpretative Bulletin on General Coverage (May 1950), 29 CFR, 1953 Supp., 776.4.

[4] See, in addition to decisions discussed in the text, *Southern California Freight Lines* v. *McKeown*, 148 F. 2d 890 (C. A. 9) certiorari denied, 326 U. S. 736 rehearing denied 326 U. S. 808; *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527 (C. A. 2) cer-

> commerce or in the production of goods for commerce, he is entitled to the full benefits of the Act.

This ruling was reaffirmed in a very recent decision of the Fifth Circuit in *Mitchell* v. *Warren Oil Co.,* 213 F. 2d 273, decided May 31, 1954.

Applying the workweek standard to the instant case, it is evident that the employees here involved spent a substantial part of the specified workweeks in production of lumber for interstate commerce. It is undisputed that approximately 14% of its production during this period was shipped out of the State (Plaintiff's Ex. No. 4; R. 28 and plaintiff's Ex. No. 7). It is thus clear that the volume of interstate business during these weeks was not so small as to be outside the scope of the Act as *de minimis.* The wealth of court decisions holding the Act applicable to employees of an employer whose percentage of interstate business was much smaller than that in the instant case is almost unlimited, and includes a decision of this Court. *Southern California Freight Lines* v. *McKeown,* 148 F. 2d 890 (C. A.

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tiorari denied, 331 U. S. 812; *Atlantic Co.* v. *Weaver*, 150 F. 2d 843 (C. A. 4) ; *Guess* v. *Montague*, 140 F. 2d 500, (C. A. 4) ; *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245 (C. A. 4) ; *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40 (C. A. 6), certiorari denied, 335 U. S. 854; *Walling* v. *Crown Overall Mfg. Co.*, 149 F. 2d 152 (C. A. 6) ; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329 (C. A. 7), certiorari denied, 332 U. S. 855; *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310 (C. A. 8), affirming 63 F. Supp. 120, 137 (N. D. Iowa, 1945) ; *Walling* v. *Mutual Wholesale Food and Supply Co.*, 141 F. 2d 331 (C. A. 8) ; *Colbeck* v. *Dairyland Creamery Co.*, 70 S. D. 283, 17 N. W. (2d) 262 (Sup. Ct. S. Dak., 1945).

9), certiorari denied, 326 U. S. 736, rehearing denied, 326 U. S. 808.[5]

In the *McKeown* case, this Court held an employee to be engaged in interstate commerce under the Act since 7% of his time was spent in interstate commerce. In rejecting defendant's contention that "7% of appellee's [employee's] time spent in interstate

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[5] See also *Schmidt* v. *Peoples Telephone Union of Maryville*, 138 F. 2d 13 (C. A. 8), holding the Act applicable to switchboard operators where only a fraction of one percent of the company's revenue was derived from interstate calls; *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C. A. 10), certiorari denied, 318 U. S. 774, holding the Act applicable to employees in the slaughtering department of a packing house, since their work also produced by-products representing from 3 to 4 percent of the value of the total production, some of which were shipped interstate after further processing by other employers; *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. A. 10), holding the Act applicable to an employee of a power company, only 4 percent of whose electric power was sold to consumers using it for interstate purposes; *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C. A. 6), certiorari denied, 322 U. S. 728, holding the Act applicable to employees of a newspaper, only 2 to 3 percent of whose circulation was out of the State; *Chapman* v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (C. A. 6), certiorari denied 320 U. S. 761, holding the Act applicable to employees manufacturing ice, only approximately 7 percent of which went out of the State; *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5), holding the Act applicable to a watchman as engaged in the production of goods for commerce, where only 7.7 percent of the goods processed at a warehouse were shipped out of the State; *Ivey* v. *Foremost Dairies, Inc.*, 106 F. Supp. 793 (W. D. La. 1952), affirmed 204 F. 2d 186 (C. A. 5), holding the Act applicable to employees of a dairy, only approximately seven-tenths of one percent of whose product was sold outside the State; *Walling* v. *May* (not officially reported), 7 W. H. Cases 239; 13 Labor Cases Para. 63,985 (E. D. Tenn., 1947), holding the Act applicable to all of the manufacturing portions of an employer's business, even though only 2.7 percent of the firm's total business was in the production of goods for interstate commerce.

commerce is so unsubstantial an amount that appellee [employee] was not engaged in interstate commerce at all within the meaning of the Act" (148 F. 2d at 891; brackets added), this Court stated:

> It is true that employees whose activities merely affect interstate commerce are not within the Fair Labor Standards Act, though within the Wagner Act, 29 U. S. C. A. § 151 et seq. However, there seems no logical reason why there should be any difference in the substantiality of the amount of "affecting of" or being "in" commerce to bring employment under either act.
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> In this connection we have said in National Labor Relations Board v. Cowell Portland Cement Co., 108 F. 2d 198, 201, "The quantity of cement shipped out of state is not de minimis merely because it is but a small percentage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire product of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 percent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly * * *."[6]

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[6] See also *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 at 240 (C. A. 10) where the court stated that since the Supreme Court "held in United States v. Darby, 312 U. S. 100, 123, * * * the Act applies to a small producer, it must equally apply to the production for commerce of a small portion of the total production of a large producer."

See also this Court's statement in its recent decision in *General Electric Co.* v. *Porter,* 208 F. 2d 805 at 810; certiorari denied, 347 U. S. 951.

> * * * Moreover, the Act does not require that an employee be employed exclusively in the particular [covered] occupation.

The record also discloses that there was no effort here to segregate the interstate from the intrastate production (R. 35). In such a case, the only practical method for determining the applicability of the Act to employees whose interstate and intrastate duties are commingled is the method outlined by the Fourth Circuit in *Guess* v. *Montague,* 140 F. 2d 500, 504 (C. A. 4), where the court ruled that a *prima facie* showing, entitling an employee to the protection of the Act, is made where it appears that the employee worked in interstate as well as in intrastate business and the two classes of business were commingled in the employer's operations. The burden is then upon the employer to produce evidence that certain employees "did not render any service in connection with its interstate business."[7]

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[7] Defendant, in the court below, relied upon the decisions in *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Fla., 1941) and *Hill* v. *Jones*, 59 F. Supp. 569 (W. D. Ky., 1945). The *Goldberg* case involved a small bakery which made a few interstate sales amounting to about $18.00 a week. Apart from the fact that the bakery's interstate business (which the court considered "trifling and inconsequential") is hardly comparable to the substantial volume of defendant's interstate business for the period in question here, it is noteworthy that the *Goldberg* decision was handed down on March 18, 1941, one day after the Supreme Court's decision in *United States* v. *Darby*, discussed, *supra*, pp. 5–6. It is obvious that the district court at that time did not have the benefit of the *Darby* decision and, of course, did not have the benefit of

It may be noted that this is not an action to restrain future violations but is one to recover wages claimed to be due under the Act during specified workweeks when the named employees were indisputably engaged in the production of goods for commerce. Whatever relevance the isolated character of the transaction may have in determining whether an injunction should issue to restrain future violations, this fact is plainly of no relevance in determining the employee's right to recover for the work weeks in which he was indisputably engaged substantially in producing goods for commerce.

The above authorities, we submit, suffice to establish the applicability of the Act to the named employees for the period covered by this action. The restriction relied on by the court below finds no sanction in the terms of the Act, is contrary to the rule that coverage must be tested by the nature of the employee's work and not by reference to the employer's business, and ignores the fact that the workweek is the standard for determining coverage, which, in the case at bar, is being sought only for specified workweeks during which the employees were admittedly engaged in the production of goods for commerce.

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the more recent decision in *Mabee* v. *White Plains Pub. Co.*, discussed, *supra*, p. 5. The *Hill* case is similarly clearly distinguishable. There, too, the employer's interstate sales of tallow amounted to only a fraction of one percent of the employer's total business, i. e., much less than the volume of interstate sales here involved during the period in question, and, unlike the situation here, there was no showing that the specific employees involved had participated substantially in the production of the goods which went out of the state.

CONCLUSION

The decision below should be reversed, with instructions to enter a verdict that Section 7 of the Act was applicable to Westfall, Kramp, Pierce and Horn, for all working hours of each workweek of the period covered by this action, and to enter judgment for the appellant for an amount equal to the difference between the wages actually paid to Westfall, Kramp, Pierce and Horn by appellee and the amount to which they were entitled under Section 7 during the period in question.

Respectfully submitted.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Chief of Appellate Litigation,
MORTON J. MARKS,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

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APPENDIX

Statutory Provisions Involved

Fair Labor Standards Act of 1938, as amended (c. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.) sec. 201 et seq.).

MAXIMUM HOURS

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, * * *.

PENALTIES

Sec. 16. * * *

(c) The Administrator is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of

any employee to accept such payment shall, upon payment in full, constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Administrator claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Administrator may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Administrator if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Administrator, unless such action is dismissed without prejudice on motion of the Administrator, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Administrator on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator under this subsection for the purposes of the two-year statute of limitations provided

in section 6 (a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

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